

STATE V. CRUZ, 1983-NMSC-045, 99 N.M. 690, 662 P.2d 1357 (S. Ct. 1983)

**STATE OF NEW MEXICO, Petitioner,
vs.
GENE CRUZ, Respondent.**

No. 14741

SUPREME COURT OF NEW MEXICO

1983-NMSC-045, 99 N.M. 690, 662 P.2d 1357

May 13, 1983

ORIGINAL PROCEEDING ON CERTIORARI, Leon Karelitz, District Judge

COUNSEL

Paul Bardacke, Attorney General, William Lazar, Assistant Attorney General, Santa Fe, New Mexico, for Petitioner.

Michael Dickman, Appellate Defender, Lynne Corr, Assistant Appellate Defender, Santa Fe, New Mexico, for Respondent.

JUDGES

Stowers, J., wrote the opinion. WE CONCUR: H. VERN PAYNE, Chief Justice, WILLIAM R. FEDERICI, Justice, SOSA, Senior Justice, respectfully dissenting. RIORDAN, Justice, specially concurs.

AUTHOR: STOWERS

OPINION

{*691} STOWERS, Justice.

{1} This case arises from a grand jury indictment that preceded Gene Cruz's (Respondent) subsequent conviction of two counts of battery on a peace officer. Respondent argued that a defect in the grand jury proceedings required reversal of his conviction and sentence. The Court of Appeals agreed, reversed the trial court's denial of Respondent's motion to dismiss, reversed Respondent's convictions, and dismissed the indictment without prejudice. This Court granted certiorari, and we reverse the decision of the Court of Appeals.

{2} We discuss one issue: whether the target of a grand jury investigation can frustrate the orderly presentation of the State's case by refusing to testify when a reasonable request has been made and a reasonable opportunity afforded to do so, and then claim he was deprived of the opportunity to testify before the grand jury.

{3} The relevant facts of this case are as follows. Respondent was arrested on charges of aggravated battery upon two police officers contrary to Section 30-22-25, N.M.S.A. 1978. On October 26, 1981, Respondent received a letter notifying him that he was the target of a grand jury investigation and that he had a right to appear and testify before the grand jury. See § 31-6-11(B), N.M.S.A. 1978 (Cum. Supp. 1982). On October 30, 1981, Respondent appeared at the courthouse in which the grand jury was convened. Respondent was not accompanied by an attorney when he appeared at the courthouse, and his testimony was inconsistent as to whether he was represented by counsel at the time of the grand jury presentment. According to the trial judge's oral findings of fact, however, Respondent "did in fact get advice from his attorney as to whether or not to appear before the grand jury. * * *" The prosecutor presenting the case to the grand jury asked Respondent several times whether he wished to testify. Respondent repeatedly replied that he was unsure. He stated that he wanted to testify after another witness, Leland Cruz. The prosecutor replied that it was his prerogative to determine the order of witnesses, and that if Respondent did not take immediate advantage of his opportunity to testify, he would not be allowed to testify at all. Respondent persisted in stating that he wanted to testify after Leland Cruz. Becoming impatient, the prosecutor said that Respondent had ten seconds in which to decide whether to testify or Respondent would be foreclosed from testifying. The prosecutor then "counted down" ten seconds on his watch and turned his attention to the next witness. Some time later, Respondent informed the prosecutor that he wished to testify, but the prosecutor replied that he had lost his opportunity to do so. Respondent was not allowed to testify.

{4} Respondent filed a motion to dismiss his subsequent indictment on the grounds that he had been deprived of "a meaningful opportunity to testify" before the grand jury in violation of Section 31-6-11(B) and that "[b]ecause Respondent was not afforded said opportunity, he was denied the opportunity * * * to inform the prosecuting attorney of evidence directly negating the guilt of Respondent in violation of N.M.S.A. §§ 31-6-4(C) and 31-6-11(B)* * *." The trial court denied the motion to dismiss, finding that (1) Respondent was afforded ample opportunity to make up his mind about testifying; (2) the prosecutor "has to have the ability to be able to keep order in the grand jury room;" and (3) "to a large extent, this effort on the part of Gene Cruz was an effort to gull the District Attorney, and to gull the grand jury, and to try to create an error which did not exist * * *."

{5} Following a trial on the merits, Respondent was convicted on two counts of aggravated battery on a police officer and found not guilty upon a third count. The Court of Appeals reversed the trial court's denial of the motion to dismiss, reversed Respondent's convictions, and dismissed the indictment without prejudice.

{6} This case turns on interpretation of Section 31-6-11(B). That section provides that "[t]he target [of a grand jury investigation] {692} shall be notified of his target status and be given an **opportunity to testify**, if he desires to do so.* * *" **Id.** (emphasis added). In addition to being given the opportunity to testify, a target must also be notified "in sufficient time to exercise his right to testify." **Rogers v. State**, 94 N.M. 218, 221, 608 P.2d 530, 533 (Ct. App. 1980). In **Rogers**, the Court of Appeals held that the thirty-six hours provided by statute for witnesses subpoenaed to testify before grand jurors was sufficient time. **Rogers v. State, supra** at 221, 608 P.2d at 533; **see** § 31-6-12(A), N.M.S.A. 1978 (Cum. Supp. 1982). The Respondent in the present case had four days notice, which was certainly sufficient time to exercise his right to testify. **Rogers v. State, supra**.

{7} The next question is whether the prosecutor's conduct obstructed Respondent's opportunity to testify. Although the Court of Appeals held that the State had not met its burden of establishing that Respondent in fact had an opportunity to testify, the record discloses that Respondent was asked several times whether he wished to testify, but he refused to make a decision. While it is true that the prosecutor may not "juggle witnesses in order to keep out relevant testimony," **State v. Lampman**, 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980), **overruled on other grounds, Buzbee v. Donnelly**, 96 N.M. 701, 634 P.2d 1253 (1981), this does not suggest that the prosecutor may not exercise any control at all over the order of witnesses. In dealing with the grand jury, the prosecutor's duty is to protect both the public's interest and the rights of the accused. **State v. Hill**, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975). As Section 31-6-7, N.M.S.A. 1978 (Cum. Supp. 1982) provides, "The prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury." When no impermissible motive appears, we do not find the scheduling of witnesses to be inconsistent with this statutory duty. The record in this case discloses no ill motive on the part of the prosecutor. Moreover, there was nothing unreasonable in the prosecutor's assertion of the right to maintain order in the grand jury proceedings. **See State v. Saiz**, 92 N.M. 776, 595 P.2d 414 (Ct. App. 1979). Therefore, because Respondent was both notified of his target status and given an opportunity to testify, we find that the statutory requirements were met.

{8} The judgment of the Court of Appeals is reversed, and Respondent's convictions are affirmed.

{9} IT IS SO ORDERED.

WE CONCUR: H. VERN PAYNE, Chief Justice, WILLIAM R. FEDERICI, Justice.

SPECIAL CONCURRENCE

RIORDAN, Justice, specially concurs.

DISSENT

SOSA, Senior Justice, Dissenting.

{10} I respectfully dissent. I agree with Judge Donnelly's opinion in the Court of Appeals that the appellant had a right to testify before the grand jury, that the state has not established a waiver of that right, and that the authority to deny a target witness's request to testify before a grand jury that is in session does not, in this instance, rest with the prosecutor.

{11} The requirement of NMSA 1978, Section 31-6-11(B) (Cum. Supp.1982), that a target witness shall be given an opportunity to testify before the grand jury if he so desires is mandatory except in certain specified circumstances that are concededly not present here. **Rogers v. State**, 94 N.M. 218, 608 P.2d 530 (Ct. App.1980). This statutory right has been jealously guarded by our courts. In New Mexico a witness who testifies before a grand jury and subsequently becomes the focus of an investigation is entitled to testify again because he would otherwise be deprived of his right to testify in his capacity as a target witness. **State v. Gonzales**, 96 N.M. 513, 632 P.2d 748 (Ct. App.), **cert. denied**, 96 N.M. 543, 632 P.2d 1181 (1981).

{12} The district attorney is required to exercise reasonable diligence in complying with the statute. **Rogers**, 94 N.M. 218, 608 P.2d 530. Furthermore, the prosecutor has an obligation to protect the rights of the accused as well as the public interest, **State v. Hill**, 88 N.M. 216, 539 P.2d 236 (Ct. App.1975), and is required to conduct himself in a fair and impartial manner. NMSA 1978, § 31-6-7 (Cum. Supp.1982). I do not believe that the prosecutor's behavior in allowing the witness only ten seconds in which to decide whether to testify or not and in refusing the witness's request to testify a few moments later, after only one other witness had appeared before the grand jury, was reasonable, fair, or necessary for the protection of the public interest.

{13} "The grand jury is not, and should not be, the tool of the prosecuting attorney to manipulate at will." **Davis v. Traub**, 90 N.M. 498, 500, 565 P.2d 1015, 1017 (1977). For this Court to accede to such conduct on the part of a prosecutor is to authorize and, indeed, to invite the district attorney to use the grand jury as a tool of the prosecution.

{14} For the above reasons, I respectfully dissent.